

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

John Bonilla as Chairman and Ken  
Walters as Co-Chairman of the  
Board of Trustees for the Operating  
Engineers Health and Welfare Trust  
Fund, et al,

Plaintiffs,

v.

Neville Structures dba Neville  
Brothers, Inc., a business entity, and  
Steve Neville, an individual,

Defendants.

No. C-05-3410 CW (WDB)

**ORDER FOR SUPPLEMENTAL  
BRIEFING RE MOTION FOR  
DEFAULT JUDGMENT**

Judge Wilken has referred plaintiffs' Motion for Default Judgment to the undersigned.

**By Thursday February 2, 2006, at 3:00 p.m.**, plaintiffs must file with the Court and serve on defendants a supplemental submission addressing the follow issues. If, for economic or other reasons, plaintiffs do not address any of the issues below, the court will conclude that plaintiffs have opted to waive the omitted request or argument.

(1) Plaintiffs' request for damages includes liquidated damages pertaining to contributions for work performed in October 2004. It appears that

1 contributions for this work were delinquent but were paid in December 2004,  
2 before plaintiffs filed the Complaint in this action.

3 ERISA compels the court to award plaintiffs “liquidated damages provided  
4 for under the plan in an amount not in excess of 20 percent . . . of the amount  
5 determined by the court [as unpaid contributions].” 29 U.S.C. §1132(g)(2)(C)(ii).  
6 Liquidated damages are “mandatory and not discretionary” if “the following three  
7 requirements [are] satisfied: (1) the employer must be delinquent at the time the  
8 action is filed; (2) the district court must enter a judgment against the employer;  
9 and (3) the plan must provide for such an award.” *Northwest Administrators, Inc.,*  
10 *v. Albertson’s Inc.*, 104 F.3d 253 (9th Cir. 1996) citing *Idaho Plumbers &*  
11 *Pipefitters v. United Mechanical Contractors, Inc.*, 875 F.2d 212 (9th Cir. 1989).

12 If the first requirement is not met plaintiffs are not entitled to liquidated  
13 damages under ERISA. Said another way, plaintiffs are *not* entitled to statutory  
14 liquidated damages with respect to contributions that were delinquent but were  
15 paid before the date the Complaint was filed.

16 Plaintiffs MUST recalculate their damages request to eliminate liquidated  
17 damages pertaining to the October 2004 contributions. Additionally, plaintiffs  
18 indicate that they have assessed interest on those liquidated damages.  
19 Accordingly, plaintiffs MUST also recalculate their request for interest to  
20 eliminate interest on those liquidated damages.

21 (2) With respect to the October 2004 contributions, plaintiffs might,  
22 however, be entitled to liquidated damages as a matter of contract. *Idaho*  
23 *Plumbers*, 875 F.2d at 217 (§1132(g)(2) does not preempt the federal common law  
24 of liquidated damages when that section does not apply); *Board of Trustees v.*  
25 *Udovch*, 771 F.Supp. 1044 (N.D. Cal 1991).

26 A contractual “liquidated damages provision is enforceable in this setting,  
27 and not void as a penalty, only if (1) ‘the harm caused by a breach [is] very  
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1 difficult or impossible to estimate’ and (2) the fixed amount is ‘a reasonable  
2 forecast of just compensation for the harm caused.’” *Udovch*, 771 F.Supp. at 1048  
3 citing *Idaho Plumbers*, 875 F.2d at 217.

4 As stated in *Udovch* “[w]hen an employer is delinquent in paying  
5 contributions into a fringe benefit trust fund, the fund suffers some kinds of harms  
6 that are very difficult to gauge.” 771 F. Supp. at 1049.

7 With respect to the second prong of the test, whether the fixed amount  
8 represents a reasonable forecast for the harm caused, we focus on the “parties’  
9 intentions.” *Udovch*, 771 F. Supp. at 1048. The negotiating parties “must make a  
10 good faith attempt to set an amount equivalent to the damages they anticipate.”  
11 *Idaho Plumbers*, 875 F.2d at 217. For the reasons explained in *Udovch* we focus  
12 “on the character of the process that led, at the time the contract language was  
13 drafted, to the fixing of the liquidated damages figures or formulas.” 771 F.Supp.  
14 at 1048. We look for evidence that “the drafters made a good faith effort to  
15 determine that there would be a rational relationship between the damages that  
16 would be paid under the clause and the harms that would be suffered *in most of the*  
17 *situations that were reasonably foreseeable.*” 771 F. Supp. at 1049 (emphasis in  
18 original). More specifically, we look for evidence:

19 (1) that the drafters gave some thought to the kinds of harms that the  
20 liquidated damages provision would embrace, (2) that other more  
21 direct provisions were not made for compensation for at least the bulk  
22 of the harms intended to be so embraced, and (3) that it was not  
23 obvious, at the time of drafting, that the figure or formula selected  
would result, in a substantial percentage of instances in which it  
might be triggered, in amounts of money flowing from defendants to  
plaintiffs that clearly would be larger than necessary to compensate  
for the kinds of harms the plaintiffs were likely to in fact suffer.

24 *Udovch*, 771 F.Supp. at 1048. Plaintiffs may not receive contractual liquidated  
25 damages if such damages would constitute nothing more than a “penalty.”

26 Plaintiffs have submitted no evidence or argument that would support a  
27 finding that the liquidated damages provision found in the governing contracts is  
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1 'a reasonable forecast of just compensation for the harm caused.' If plaintiffs wish  
2 to obtain a judgment for contractual liquidated damages with respect to the  
3 October 2004 contributions they must submit supplemental evidence and  
4 argument in support of that request.

5 (3) The governing contracts provide for interest at the rate of 12% per  
6 annum. Plaintiffs state that interest is assessed each month at the rate of 1% and  
7 that interest is assessed on previously accrued interest. Where in the collective  
8 bargaining agreement and/or Trust Agreements are these practices authorized?

9 (4) Plaintiffs seek attorneys' fees at the rate of \$225 per hour. Plaintiffs  
10 have submitted no information about the experience of the attorneys who  
11 performed work on this case to justify the rate sought.

12 (5) Plaintiffs' request for costs includes a charge for a "messenger fee."  
13 What was being delivered and to whom?

14 (6) Plaintiffs request an audit. Plaintiffs must describe the procedure that  
15 will be followed by the auditor and must state whether this procedure provides  
16 defendants with an opportunity to participate and/or to object.

17 (7) Plaintiffs seek judgment against Steve Neville, individually, on the  
18 ground that he constitutes the "employer" as that term is defined by ERISA and on  
19 the alternate ground that he is a "fiduciary" who exercises control over plan assets.  
20 Motion at 5-6. In the Ninth Circuit, employer contributions do not become "plan  
21 assets" "[u]ntil the employer pays the employer contributions over to the plan."  
22 *Cline v. The Industrial Maintenance Engineering & Contracting Co.*, 200 F.3d  
23 1223, 1234 (9th Cir. 2000).

24 If plaintiffs do not submit additional authority on this subject the court will  
25 assume that plaintiffs continue to pursue their contention that Mr. Neville is liable  
26 as the "employer" but forego their *alternate* contention that he is liable as a  
27 "fiduciary."  
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1 (8) Plaintiffs ask for a declaration that they are entitled to post-judgment  
2 interest at the contract rate as well as attorneys' fees and costs incurred to enforce  
3 the judgment. Absent persuasive authority to the contrary, it is the court's view  
4 that this request is premature, and the court will recommend that Judge Wilken not  
5 address these requests at this time. We also will recommend that Judge Wilken  
6 not preclude plaintiffs from requesting post-judgment interest and/or fees and  
7 costs incurred to enforce the judgment at the appropriate time after Judge Wilken  
8 enters a final judgment.

9 **If defendants wish to respond to plaintiffs' February 2nd submissions**  
10 **or any other matters set forth in plaintiffs' Motion for Default Judgment,**  
11 **then by Thursday, February 9, 2006, at 3:00 p.m.,** defendants must file with the  
12 court and serve on plaintiffs a letter asking the court to grant defendants  
13 permission to respond and to set a briefing schedule.

14 **The Court ORDERS plaintiffs to serve a copy of this Order on**  
15 **defendants immediately.**

16 IT IS SO ORDERED.

17 Dated: January 27, 2006

18 /s/ Wayne D. Brazil  
19 WAYNE D. BRAZIL  
20 United States Magistrate Judge

21 Copies to:  
22 Plaintiffs with direction to serve defendants,  
23 CW, wdb, stats  
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